United States Court of Appeals

for the Second Circuit

APPENDIX

76-7005

United States Court of Appeals

FOR THE SECOND CIRCUIT

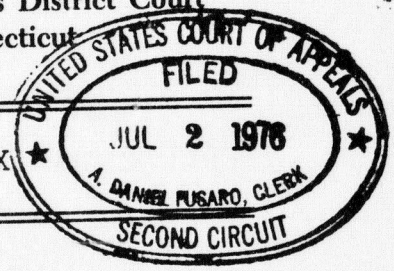
No. 76-7005

EAST HARTFORD EDUCATION ASSOCIATON, ET AL
Appellants

v.

BOARD OF EDUCATION OF THE
TOWN OF EAST HARTFORD, ET AL
Appellees

On Appeal From the United States District Court
for the District of Connecticut



JOINT APPENDIX

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Relevant Docket Entries

DATE	PROCEEDINGS
9/11/73	Complaint and request for class action filed. Summons issued and together with same and copies of complaint handed to Marshall for service.
1/21/74	Answer filed.
1/30/74	Plaintiff's First Interrogatories Prepounded to Defendants filed.
4/24/74	Defendants' Answers to Plaintiff's First Interrogatories filed.
3/17/75	Motion for Judgment on the Pleadings.
3/17/75	Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings filed.
4/29/75	Memorandum of Law In Opposition to Defendants' Motion for Judgment on Pleadings filed.
10/03/75	Ruling on Defendants Motion for Summary Judgment. Clarie, J. granted.
12/16/75	Judgment, Entered, Markowski, C.
12/22/75	Notice of Appeal filed, Copies mailed to counsel. Attested copies of notices and docket entries mailed to the U.S. Court of Appeals and New Haven.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

EAST HARTFORD EDUCATION ASSOCIATION, THE CONNECTICUT EDUCATION ASSOCIATION, INCORPORATED, and RICHARD P. BRIMLEY	)	
Plaintiffs	)	
VS.	)	CIVIL ACTION NO.
BOARD OF EDUCATION OF THE TOWN OF EAST HARTFORD, and BARBARA ATWOOD, ROBERT BANNON, KENNETH CARRIER, M. GLENN FRANK, ELEANOR KEPLER, WALTER H. MILLS, JR., TIMOTHY J. MOYNIHAN, JOYCE RUGGLES and JOHN J. SMITH, JR., INDIVIDUALLY, and in their capacities as MEMBERS OF THE BOARD OF EDUCATION OF THE TOWN OF EAST HARTFORD,	)	COMPLAINT
Defendants	)	

This is a civil action brought pursuant to Title 42 U.S.C. Sections 1983 and 1988 by plaintiffs on their own behalf and on behalf of all others similarly situated.

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1343 for an injunction to prevent the further deprivation under color of State law, statute, ordinance, regulation, custom or usage, enforced by the Defendants in their capacities as public officials, of rights, privileges and immunities secured by the First, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States; and pursuant to Title 28 U.S.C. Section 1331, in that the matter in controversy exceeds $10,000.00, exclusive of interest and costs, and arises under the Constitution of the United States; and pursuant to the Constitution of the United States. Jurisdiction is further invoked pursuant to Title 28 U.S.C. Sections 2201, 2202, as the plaintiff seeks a judgment declaring unconstitutional a policy of the Board of Education of the Town of East Hartford, Connecticut.

CLASS ACTION

2. This is a class action brought by plaintiffs on their behalf and on behalf of all others similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class represented by plaintiffs consists of all teachers who are employed by the Board of Education of the Town of East Hartford who are presently being deprived of rights under the United States Constitution, as enumerated in Paragraph 1 above, in the manner hereinafter set forth.

There are questions of law and fact common to the claims and defenses of the class; the plaintiffs have claims and defenses typical of the claims and defenses of the class and fairly and adequately represent the interests of the class; the defendants have acted on grounds generally applicable to the plaintiffs and the class. Therefore, injunctive and declaratory relief are appropriate to the class as a whole. Separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the defendants; questions of law and fact common to members of the class predominate over any question affecting only an individual member or members; and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

PARTIES PLAINTIFF

3. Richard P. Brimley is a teacher employed by the Board of Education of the Town of East Hartford. He is a citizen of the State of Connecticut and of the United States.

4. The East Hartford Education Association is a duly organized, professional association duly selected by the certified professional employees of the Board of Education of the City of East Hartford as their exclusive representative; and the Connecticut Education Association, Inc., is a duly incorporated, non-profit corporation organized and existing under the

laws of the State of Connecticut. These plaintiffs exist for the purposes of improving the character and advancing the interest of the teaching profession, and the cause of education, and representing their respective memberships, consisting of numerous professional educators, both within and without the Town of East Hartford and the State of Connecticut.

PARTIES DEFENDANT

5. The Defendant, Board of Education, is the duly elected and constituted Board of Education of the Town of East Hartford, Connecticut. Defendants, Mrs. Barbara Atwood, Robert Bannon, Kenneth Carrier, M. Glenn Frank, Mrs. Eleanor Kepler, Walter H. Mills, Jr., Timothy J. Moynihan, Mrs. Joyce Ruggles and John J. Smith, Jr. are members of the Board of Education of the Town of East Hartford. They are sued individually and in their capacity as members of the said Board of Education.

CAUSES OF ACTION

6. There is presently in effect in the East Hartford School System a Policy entitled "Regulations for Teacher Dress" (a copy of which is annexed hereto), hereinafter referred to as the "Dress Code".

7. The Defendants have caused this Dress Code to be enforced in the School System in such a way as to require that all male teachers wear a jacket, shirt and tie in all classroom situations except gym class, other classes such as machine shop

in which a tie might constitute a safety hazard to the teachers and classes requiring the use of chemicals which might endanger the clothing of the teachers.

8. The plaintiffs submit that the Dress Code which the defendants seek to enforce against them is unconstitutional on its face, and/or in its application, for the following reasons:

(a) It prohibits the exercise of fundamental constitutional rights and liberties in violation of the First, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States without demonstrating that the exercise of those rights would materially or substantially interfere with the operations of the schools.

(b) It prohibits the exercise of fundamental constitutional rights and liberties in violation of the First, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States in the absence of compelling or even legitimate governmental interest.

(c) It is substantially overbroad in that it encompasses within its scope activity which is clearly protected by federal guarantees of free speech, expression, privacy, personal liberties and academic freedom, all in violation of the First, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States.

(d) It is vague and imprecise, and by forcing teachers to guess at its meaning, has a chilling effect on the exercise by plaintiff and members of his class, of their constitutional rights to freedom of speech, expression, the right to privacy and the right to personal liberties and academic freedom, all in violation of the First, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

9. The plaintiffs have exhausted their administrative remedies under the collective bargaining agreement in that the dispute here in question was submitted for arbitration before Arbitrator Archibald Cox.

10. Arbitrator Cox, in an opinion dated January 25, 1973 (a copy of which is attached hereto) ruled that the issues herein involved were not arbitrable under the collective bargaining agreement.

EQUITABLE RELIEF AND IRREPARABLE INJURY

13. There is between the parties an actual controversy as hereinbefore set forth. The plaintiffs and those similarly situated are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the fact that the plaintiffs are subject to disciplinary action or removal from employment for violation of the Dress Code, and thus are unable to exercise the rights guaranteed to them under the Constitution of the United States as hereinbefore set forth.

14. The plaintiffs have no plain, adequate or complete remedy at law.

15. The defendants' course of conduct with regard to this plaintiff is adverse to the public interest.

16. The Defendants' actions constitute a continuing policy and course of conduct justifying this Court in granting a permanent injunction to enjoin the Defendants' from further enforcement of its Dress Code.

PRAYER

Wherefore, plaintiffs respectfully pray:

A. That this Court declare said Dress Code unconstitutional on its face and/or as applied and permanently enjoin the defendants, their agents, and employees, subordinates, and persons in concert or co-operation with them from maintaining said Dress Code in effect.

B. That the Court grant plaintiffs their Court costs and reasonable counsel fees.

C. That the Court grant plaintiffs such other and further relief as may be equitable and proper.

Dated this 25th day of July, 1973.

Respectfully submitted,

Gould, Killian & Krechevsky

By _____

Martin A. Gould
37 Lewis Street
Hartford, Connecticut

STATE OF CONNECTICUT)
) ss.
COUNTY OF HARTFORD)

I, Richard P. Brimley, being duly sworn, depose and say that I reside in East Hartford, Connecticut, and that I am one of the Plaintiffs herein; and that I have read the foregoing complaint and know the contents thereof and that the same are true to the best of my knowledge, information and belief.

Richard P. Brimley
Richard P. Brimley

Subscribed and sworn to before me, this 5th day of September, 1973.

Martin A. Gould
Commissioner of the Superior Court

REGULATIONS FOR TEACHER DRESS

The attire of professional employees during the hours when school is in session must be judged in light of the following:

1. Dress should reflect the professional position of the employee.

2. Attire should be that which is commonly accepted in the community.

3. It should be exemplary of the students with whom the professional employee works.

4. Clothing should be appropriate to the assignment of the employee, such as slacks, and jersey for gym teachers.

In most circumstances the application of the above criteria to classroom teachers would call for jacket, shirt and tie for men and dress, skirts, blouse and pantsuits for women.

If an individual teacher feels that informal clothing such as sportswear, would be appropriate to his or her teaching assignment, or would enable him or her to carry out assigned duties more effectively, such requests may be brought to the attention of the Principal or Superintendent. An attempt should be made on all levels to insure that the above principles are applied equitably and consistently throughout the school system.

EAD/a
3/10/72

AMERICAN ARBITRATION ASSOCIATION, Administrator

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

East Hartford Ed. Association

and

East Hartford Board of Ed.

Case Number: 12 39 0194 72

Award of Arbitrator(s)

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated ///covering the period August 5, 1971-June 30, 1974 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

The issues concerning teachers' dress submitted by the Association are not arbitrable under the terms of the 1971-1974 Agreement.

January 25, 1973

Archibald Cox
Archibald Cox

DATED:

STATE OF Massachusetts } ss.:
COUNTY OF Middlesex }

On this 25 day of January, 19 73, before me personally came and appeared Archibald Cox to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

FORM L14-AAA-10M-7-69 337

App. 10

Donna Chiozzi

OPINION

This arbitration proceeding between East Hartford Education Association and the East Hartford Board of Education was instituted by the Association's demand for arbitration of the grievance regarding the Board's Regulations for Teacher Dress, particularly affecting Richard P. Brimley. The hearing was held, upon appropriate notice, in the American Arbitration Association offices in Hartford on December 14, 1972. Both parties were represented by counsel. Both were afforded a full opportunity to present evidence and argument theron. The evidence on the merits was received without prejudice to the Board's challenge to the arbitrability of the questions presented by the Association. Both parties filed post-hearing briefs. The case is now ripe for decision.

The facts are as follows:

For some years the teachers and administrators in the East Hartford schools had observed generally understood but unwritten rules prescribing a degree of formality in a teacher's classroom attire, including coats and neckties for men. Mr. Brimley, a high school English teacher, objected. On November 7, 1970 the Superintendent of Schools having rejected Mr. Brimley's protest, issued a memorandum setting forth the official policy concerning dress. Only one paragraph need be quoted here--

> The attire should be that which is commonly accepted as modal in the business and professional world. Clothing which is more informal and sport wear would not be appropriate in our profession.

Mr. Brimley, after brooding over what he considered an infringement of his personal liberty, wore a sports shirt and sweater to school without a coat or necktie. When reprimanded, he filed a grievance. In rejecting the grievance at the first level, his Principal stated--

> The wearing of a jacket and tie or jacket and turtleneck shirt meets the intent of this memorandum. A sweater and sports shirt without tie are sport wear and therefore not appropriate attire.

At the third level the School Board denied the grievance but did not comment upon the wearing of turtleneck shirts. The Association then carried the case to arbitration.

The arbitrator had to consider three provisions of the January 1970--June 30, 1971 collective bargaining agreement, which was then in force. Article 18.2 defined a grievance as--

> an event or condition which affects the welfare or conditions of employment of a teacher or a group of teachers and/or the application of any of the provisions of the Agreement.

Article 18.5 provides that a grievant may, within five days after a decision by the Board or fifteen days after the conclusion of meeting with the Board, whichever is sooner, request the Association to submit his grievance to arbitration. Article 18.5, paragraph C describes the duties of the arbitrator, and then continues--

> When the complaint or grievance involves the interpretation or application of a specific provision of the agreement between the parties, the decision of the arbitrator shall be binding upon both parties, and upon all teachers involved as grievants, during the life of this Agreement. In all other instances, the decision of the arbitrator shall be advisory.

John W. McConnell, the designated arbitrator, sustained the Brimley grievance without expressing an opinion upon which of the two sentences last quoted governed the particular case. Upon the question of arbitrability he ruled that Mr. Brimley's complaint was a grievance, and thus arbitrable, because it affected "the welfare or conditions of employment of a teacher." On the merits his award reads--

> in limiting the standard of attire to what 'is modal in the business and professional world' the regulation is unreasonable, and the administrative determination of what is accepted under this standard is arbitrary. The regulation should be withdrawn and revised.

Mr. McConnell's opinion makes his reasoning plain at least so far as the dress regulation is involved. He held it "unreasonable"--

> because the standard adopted is very narrow and not closely related to teaching, to a teacher's professional associates, or to the student's outlook.
>
> * * *
>
> The point which needs emphasis is that any effort to proscribe a single style of dress based upon what is customary in any specific group such as business and professional people fails to recognize the variety of life which exists even in the most tightly knit communities, and proves unresponsive to the pace and broad scope of change in manners and customs.

Mr. McConnell's reason for holding that the regulation "is applied arbitrarily to Mr. Brimley" is more obscure. Apparently he felt that an arbitrary line was being drawn between permissible turtleneck shirts and prohibited sports shirts, and that women were allowed to wear less formal attire than men. There is also a suggestion that Mr. Brimley had been singled out for reprimand whereas other violations of code were ignored.

During the McConnell arbitration the School Board took the position that the grievance was not arbitrable. While Mr. McConnell had the case under advisement, the existing collective bargaining agreement expired and a new agreement, effective for the period August 5, 1971--June 30, 1974 was negotiated. A change was made in the definition of "grievance" which is said to affect the arbitrability of disputes. The new definition reads:

> A grievance shall mean (i) complaint by a certified person or persons that his or their rights under the specific language of this agreement have been violated or that as to him or them there is a misinterpretation or misapplication of a specific provision of this agreement, or (ii) a complaint concerning an event or condition which effects the welfare or conditions of employment of a teacher or group of teachers. However, grievances defined in (ii) above may only be processed as far as level three of the grievance procedure, and level four shall not apply.

Level four deals with arbitration. Oddly, the arbitration provisions quoted above were not charged in the new agreement.

On March 10, 1972, pursuant to a vote of the School Board, the Superintendent issued new regulations for teacher dress. They differed from the old regulations in their wording and also in three important respects.

First, the new regulation states that a teacher's dress should conform to the standard which is "commonly accepted in the community" instead of that which is "accepted as modal in the business and professional world."

Second, the Superintendent is given discretion to permit informal clothing when a teacher "feels that informal clothing such as sportswear, would be appropriate to his or her teaching assignment, or would enable him or her to carry out assigned duties effectively."

Third, the regulation concludes with a careful admonition to apply the regulations equitably and consistently throughout the school system.

The paragraph of greatest relevance here reads-

> In most circumstances the application of the above criteria to classroom teachers would call for jacket, shirt and tie for men and dress, shirts, blouse and pants suits for women.

On March 4, 1972 Mr. French L. Hey, special assistant to the Superintendent, issued a memorandum calling attention to

the fact that the Board's regulations on dress "specifically designates a dress shirt and tie with jacket for men."

A week or so after the issuance of the new regulations Mr. Brimley requested his Principal to permit him to teach in a turtleneck shirt and jacket without a necktie. The Principal replied that, except when Mr. Brimley was engaged in film-making, he should wear a coat and necktie in accordance with the intent of the regulations. On or about May 9, 1972 the Association filed a grievance directly at the third level complaining: (1) that the Board's unilateral adoption of the new dress regulations violated the collective bargaining agreement, (2) that the regulations had been applied improperly and (3) that they had been applied improperly in the specific instances of Mr. Brimley and Mr. Ralph Smith. Mr. Smith's grievance was adjusted satisfactorily by the Board. Mr. Brimley's was denied. Thereupon the Association filed a demand for arbitration.

The Association submitted three issues at the hearing:

> 1. Whether the March 1972 regulations violate the collective bargaining agreement or the award dated September 7, 1971, or applicable law.
>
> 2. If not invalid on their face, does the April 4, 1972 memorandum from Mr. Hey constitute an improper application of the regulations?
>
> 3. If not invalid on their face, have the regulations been improperly applied in the case of Richard Brimley?

The Association denies the arbitrability of these claims. The issue thus drawn by the Association is obviously the first question for decision.

I.

The scope of the issues arbitrable under the 1971-74 Agreement is defined by Article 18.2, quoted above. Article 18.2, as it now stands, is a rewrite of Article 18.2 of the 1970-71

Agreement; it specifically limits the kinds of grievances which can be taken to arbitration. Article 18.5 is somewhat inconsistent with Article 18.2, for it carries forward from the 1970-71 Agreement the old arrangement for arbitration of a much wider range of grievances than new Article 18.2 allows, with the decision of the arbitrator final and binding only where the "complaint or grievance involves the interpretation or application of a specific provision of the agreement;" and advisory in all other cases. It seems entirely plain that the true intention of both the Association and the School Board is set forth in revised Article 18.2; that they mutually agreed to limit future arbitrations to issues described in the revision; and that the failure to make the corresponding changes in Article 18.5 was an oversight. The Association's brief does not dispute this.

Verbally, Article 18.2 divides all grievances into two classes; it then stipulates that the second class of grievance shall not be arbitrable. The second class includes--

> A complaint concerning an event or condition which affects welfare or conditions of employment of a teacher or group of teachers.

This part of the definition is so comprehensive that if one were to apply it literally, the stipulation that "level four [arbitration] shall not apply" would block arbitration of all the grievances described in clause (1). The obvious intent of Article 18.2 is to make the grievance defined in clause (1) arbitrable and to exclude all others. The case therefore turns upon the meaning of clause (i), read without regard to clause (ii). Clause (i) provides that an arbitrable grievance is--

> complaint by a certified person or persons that his or their rights under the specific language of this agreement have been violated or that as to him or them there is a misinterpretation or misapplication of a specific provision of this agreement.

Is Mr. Brimley's grievance such a complaint? Certainly it raises the kind of issue that anyone schooled in labor relations in industrial and commercial establishments would expect to find subject to final and binding arbitration. It asserts very personal and individual rights. It could easily--perhaps it will inevitably--lead to disobedience and disciplinary measures, which are normally arbitrated under collective bargaining agreements. Controversies over personal appearance have been arbitrated in air transport and perhaps other public service industries in which the appearance of employees is a matter of concern to management.

The question presented is well-suited to this method of disposition. Mr. Brimley feels very deeply and very strongly that his personal integrity is invaded and his effectiveness as a teacher diminished by the dress regulation. He has complied with the School Board's wishes pending arbitration. He testified with seeming sincerity that he agrees upon the need for neat, clean and appropriate attire. His attitude reduces the area that would be covered by any arbitration award. The School Board feels no less deeply and strongly that the atmosphere of the classroom and attitude of the students are sufficiently affected by teacher's clothing for it to require a necktie and jacket. In these circumstances both fairness and practical good sense call for a final and binding decision by some detached and unbiased tribunal. There is need for a civilized way out of the impasse short of the assertion of raw power. Submission to arbitration would not affect the real functions of a School Board. The controversy is over taste and style, not fundamental educational policy. Whichever way an arbitration award might go, the School Board would lose no power over truly educational decisions

or matters of finance. Indeed, there is not even a challenge to the School Board's authority to set minimum standards of dress designed to set examples of neatness and like virtues for Mr. Brimley joins in asserting the importance of such examples.

The costs of leaving such a dispute unresolved are very great. If the issue is not arbitrated, then a valuable teacher will be forced to choose between (a) knuckling under to a regulation that he deems offensive to his personal integrity and unjust, (b) disobeying the regulation until he is dismissed and then challenging the dismissal in court, and (c) filing a suit in the federal courts under 42 U.S.C. §1983 to assert what he believes to be his constitutional rights. The second and third courses are bound to be slow and expensive not only for Mr. Brimley but also for the School Board; indeed they would be especially expensive for the School Board if Mr. Brimley were to seek the aid of a civil liberties organization. The costs of the first course, though not monetary, would be equally great. The sense of deep injustice felt by Mr. Brimley not only on the merits but in the denial of an impartial ruling would impair his value as a teacher. I suspect that his sense of injustice would be shared by most East Hartford teachers.

Such considerations normally play a large role in the writing of collective bargaining agreements. They should be influential in a School Board's decision as to whether to insist upon the non-arbitrability of a grievance in this kind of case. An arbitrator, however, can give them only limited weight. His duty is to "interpret" the collective bargaining agreement as it is written. If its words are clear, he must give effect to them at least in the absence of persuasive evidence of a mutual mistake. If the words are not plain, he must strive to discern the intention by projecting upon the particular occasio

the outlook which is expressed in the words. If he is doubtful, he may indeed give effect to considerations of fairness and practicality because, in the absence of evidence to the contrary, he may assume that the parties intended to be both practical and just. But if the mutual intent is plain from the agreement, the arbitrator must give effect to it; he cannot impose upon the parties his own view of fairness and equity when honesty requires him to acknowledge that the agreement adopts a different view.

I find myself in this last position in the present case.

Clause (i) of Article 18.2 (A) has two parts. The first part speaks of a complaint that "rights under the specific language of this agreement have been violated". Mr. Brimley's grievance cannot be brought within these words. Mr. Brimley does not even claim that any specific language in the contract gives him the right to wear a turtleneck shirt. His principal argument is that the First and Fourteenth Amendments to the Constitution of the United States give him the right. The Constitution is not the contract. His subsidiary arguments are that both the new regulation and their application to him are inconsistent with the McConnell award. The School Board replies: (1) that the award does not cover either the present regulation or turtleneck shirts; (2) that the award was advisory, not final and binding. This controversy is not within the phrase now under examination. Mr. McConnell did not base his award upon any provision of the agreement. Where the arbitration award is not based upon any specific language in the contract, a claim that rights under that award have been violated is not a claim of rights under the "specific language of this agreement."

The second part of Clause (i) speaks of a complaint that as to the grievant--

> There is a misinterpretation or misapplication of a specific provision of this agreement.

The Association says that the "specific provision of this agreement" which has been misinterpreted in this case is Article 1.7, which reads--

> Subject to the provisions of this Agreement, the Board and the Superintendent of the Schools reserve and retain full rights, authority and discretion, in the proper discharge of their duties and responsibilities, to control, supervise, and manage the Department of Education and its professional staff under governing law, ordinances, rules and regulations--Municipal, State, and Federal.

The Association goes on to say that the School Board's dress regulations are not in accordance with governing Federal law because they violate the constitutional rights of the teachers, and therefore violate Article 1.7.

The insuperable obstacle to accepting the Association's interpretation is that a dispute over a teacher's constitutional rights is simply not a dispute over the meaning of a specific provision of the agreement. There is no dispute over the meaning of "under governing law." There is no dispute over the meaning of any other words in the agreement. Not a word in the Association's brief on the merits of Mr. Brimley's position is directed to the meaning of the words of Article 1.7 or of any other contract language. The entire argument on this point, except as it invoked the prior award, is devoted to constitutional law. Article 1.7 is invoked simply as a gateway to that vast and amorphous domain. I cannot bring myself to believe that any ordinary man who read the words agreeing to arbitrate disputes over the interpretation or application "of a specific provision of this agreement", taken with Article

1.7, would have supposed that the agreement would give an arbitrator power to review every action by the Board that adversely affected any employee, for the purpose of ascertaining whether the action is consistent with every provision of State and Federal law.

The correctness of this reading is confirmed by other considerations. The word "specific" in the phrase "of a specific provision" of this agreement is not customarily found in collective bargaining agreements. Its obvious intent is to narrow the field of arbitration by taking away from the arbitrator the power to read into the agreement notions of sound industrial policy which he believes to be fairly inferable from its terms or implicit in the very nature of a collective bargaining agreement, see Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 295 (1959), and to narrow the field to provisions that can be seen and identified in advance. The effect of accepting the Association's argument would be to open to arbitration a field very similar to that which the word specific meant to close. If it were accepted, the School Board could not possibly know in advance exactly what kinds of controversies it had agreed to arbitrate. I do not imply that this is fair or wise, but the intention seems quite obvious.

The correctness of my interpretation is further attested by the concluding sentence of Article 1.6--

> No action taken by the Board with respect to such rights, responsibilities and prerogative, other than as there are specific provisions herein elsewhere contained, shall be subject to the grievance and arbitration provisions of this Agreement.

Here is further evidence that it is contractual--not constitutional or statutory restrictions with which arbitration is to be concerned.

It also seems inherently improbable that the parties would have agreed to process through the grievance procedure and arbitrate a wide--indeed, a limitless--variety of legal questions under the laws of Connecticut and occasionally the United States. Counsel for the Association quite properly pointed out that arbitrators are now and then called upon to resolve questions of law. The duty is inescapable even for a laymen. Nevertheless, questions of law are not the stuff out of which arbitration is made. Lawyers are not the only arbitrators. Although it is not the case here, the courts are generally a far more appropriate place than arbitration for determining the powers and duties of a school board. This observation is not inconsistent with my conviction that Mr. Brimley's grievance should be arbitrated for two reasons: (1) he should not have to pitch his case on the Constitution; (2) although here Mr. Brimley goes as far as to pitch his liberty upon a claim of constitutional law, his claim cannot be held to be arbitrable without deciding that every other question of statutory, common or constitutional law affecting the School Board and a teacher is equally subject to arbitration. Should the parties expressly agree upon such an arrangement, an arbitrator would have to give affect to it, but in the absence of a clear indication that that was the intent, it cannot be assumed.

Finally, the sequence of events confirms my conclusion. Even under the old agreement the School Board was claiming that a dispute over Mr. Brimley's attire was not arbitrable. At the height of that dispute, the School Board insisted upon changing the provisions of the collective bargaining agreement in a way which surely must have altered the Association's representatives to the School Board's intention to free itself

from any kind of obligation to arbitrate this kind of case. Although the School Board's bargaining objective is by no means controlling as to the meaning, it affords the most logical explanation of the change in the words.

My award will therefore be that the issues submitted by the Association are not arbitrable under the agreement. This means only that since the School Board refused to arbitrate, the arbitrator has no power under the contract to render a decision on the merits. Nothing in the award bars arbitration if the School Board now decides that in this specific instance quick and binding decision from some impartial person is preferrable to leaving so sore a point unsettled.

January 25, 1973

Archibald Cox

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EAST HARTFORD EDUCATION ASSOCIATION, et al	:	
vs.	:	Civil No. H-156
BOARD OF EDUCATION OF THE TOWN OF EAST HARTFORD, et al	:	

DEFENDANTS' ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

The named defendants answer the interrogatories served on them by the plaintiffs on January 29, 1974 as follows:

Question One: List all classroom situations in which the Dress Code has been interpreted so as not to require that all male teachers wear a jacket, shirt and tie.

Answer: The Dress Code employs a presumption that a jacket, shirt and tie is the appropriate attire for male teachers in ordinary classroom teaching situations. Physical education, industrial arts, science laboratories, field trips, etc. are not considered to be ordinary classroom situations, and such teachers regularly have been permitted to wear other appropriate clothing. The presumption may be rebutted in individual cases if a teacher can establish to the satisfaction of the Board or the administration that more informal attire would be more appropriate to the subject matter and/or method of instruction involved (e.g. small group instruction involving drug education or sex education where the method of instruction is a "rap session"). No requests for variances in ordinary classroom teaching situations have been granted by the Board or central administration to date, and none have been submitted (with the exception of the request from the plaintiff Richard Brimley). The Board is not aware of any such requests submitted to or approved by individual school administrators.

Question Two: Have the Defendants caused the "Dress Code" to be enforced equally as to all teachers in the school system?

Answer: The Board is not aware of any situation where similar cases have resulted in inconsistent treatment of the teachers involved. The Board would not favor inconsistent enforcement by individual administrators, and would upon request take action to correct any such inequities.

Question Three: List all classroom situations in which the defendants have caused the "Dress Code" to be enforced in the school system in such a way as to require that all male teachers wear a jacket, shirt and tie.

Answer: The only case which has been decided by either the Board or the central administration is that of the plaintiff Richard Brimley, a classroom teacher of English and filmmaking at Penney High School. His request to wear a sport shirt in his classes was denied under circumstances outlined in the plaintiffs' complaint, and in the arbitration award and opinion annexed to the complaint. If any other denials have occurred at the level of individual school administrators, they have not been appealed to the central administration or the Board.

Question Four: If the interpretation or enforcement was by document or other form of written communication, set forth the contents of each document, or attach a true copy thereof to the answer to these interrogatories.

Answer: There exists no documentation of interpretation or enforcement of the Dress Code at the Board or central administration level except in connection with the grievance of the plaintiff Richard Brimley, of which the plaintiffs already have copies. The Board is aware of no such documentation at the level of individual school administrators.

Question Five: If the interpretation or enforcement was by oral communication, state the substance of each said oral

communication, the date thereof, and the parties to said oral communication.

Answer: Although the Board assumes there have been informal oral discussions of the Dress Code at the individual school building level, the Board has no actual knowledge thereof. There have been no interpretations or enforcement of the Dress Code by oral communication at the central administration or Board levels.

Question Six: State in detail the factual and legal basis for the First Special Defense to the plaintiffs' complaint.

Answer: The factual basis for the defendants' First Special Defense is in the nature of a demurrer, namely an admission (for the purpose of the Defense only) of the factual allegations of the plaintiffs' complaint. The legal basis for the defendants' First Special Defense is the defendants' claim that there is no precedent for the plaintiffs' allegation that restrictions upon the attire of public school teachers during working hours are unconstitutional; and in particular the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States confer no rights upon public school teachers as to their attire during working hours.

Dated at Hartford, Connecticut this 23rd day of April, 1974.

Timothy J. Moynihan, Chairman
East Hartford Board of Education
for and on behalf of himself and
the other named members of the
East Hartford Board of Education

VERIFICATION

STATE OF CONNECTICUT)
) ss. Hartford, April 23, 1974
COUNTY OF HARTFORD)

Personally appeared Timothy J. Moynihan of East Hartford, Connecticut, Chairman of the East Hartford Board of Education, and made oath to the truth of the matters contained in the foregoing answers, to the best of his knowledge, information and belief, before me,

Marguerite S. Van Winkle
Notary Public
MY COMMISSION EXPIRES MARCH 31, 197[illegible]

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was deposited in the United States Mail, first-class postage prepaid, this 23rd day of April, 1974 addressed to the following:

Martin A. Gould, Esq.
37 Lewis Street
Hartford, Connecticut 06103

Thomas F. Parker, Esq.
799 Main Street
Hartford, Connecticut 06103

Brian Clemow
Brian Clemow

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

East Hartford Education Association, et al. Plaintiffs	
vs.	Civil Action No. H-156
Board of Education of the Town of East Hartford, et al. Defendants	

MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, the defendants hereby move the court to enter a judgment in their favor on the pleadings on the grounds that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law in that plaintiffs' complaint fails to state a claim upon which relief can be granted.

Coleman H. Casey

Coleman H. Casey
Shipman & Goodwin
799 Main Street
Hartford, Connecticut 06103

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion was deposited in the United States mails, postage prepaid, this 14th day of March, 1975, addressed to the following:

Martin A. Gould, Esq.
37 Lewis Street
Hartford, Connecticut 06103

Coleman H. Casey
Coleman H. Casey

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EAST HARTFORD EDUCATION ASSOCIATION, et al	:	
vs.	:	Civil No. H-156
BOARD OF EDUCATION OF THE TOWN OF EAST HARTFORD, et al	:	

ANSWER

Jurisdiction

Those portions of Paragraph 1 of the plaintiff's complaint alleging jurisdiction under 28 U.S.C. §1343 are admitted; the remainder of Paragraph 1 is denied.

Class Action

The defendants leave the allegations of Paragraph 2 to a determination by the Court pursuant to Rule 23(C)(1).

Parties Plaintiff

The factual allegations of Paragraphs 3 and 4 are admitted, but the plaintiffs are left to their proof regarding the purposes for which the plaintiff organizations exist.

Parties Defendant

Paragraph 5 is admitted.

Causes of Action

Paragraph 6 is admitted.

Paragraph 7 is denied.

Paragraph 8 is denied.

Exhaustion of Administrative Remedies

Paragraphs 9 and 10 are admitted.

Equitable Relief and Irreparable Injury

Paragraphs 13 through 16 are denied.

FIRST SPECIAL DEFENSE

Even if the factual allegations of paragraphs 6 and 7 were admitted, the complaint fails to state a cause of action on which relief can be granted to any of the plaintiffs.

SECOND SPECIAL DEFENSE

The complaint fails to state a cause of action on which money damages or attorneys' fees can be granted, and therefore fails to state a cause of action against the individual defendants in their capacity as individuals, and therefore this action should be dismissed as to them.

THIRD SPECIAL DEFENSE

The complaint fails to allege any legal injury to the plaintiff Connecticut Education Association, nor any reason why it is a necessary party to this lawsuit, and therefore this action should be dismissed as to it.

SHIPMAN & GOODWIN

Attorneys for defendants

by Brian Clemow

Brian Clemow
799 Main Street
Hartford, Connecticut

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing answer was served by hand on January 21, 1974, to the following:

Alfred Covello, Esq.
799 Main Street
Hartford, Connecticut 06103

Martin A. Gould, Esq.
37 Lewis Street
Hartford, Connecticut 06103

Brian Clemow

Brian Clemow

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EAST HARTFORD EDUCATION ASSOCIATION, THE CONNECTICUT EDUCATION ASSOCIATION, INCORPORATED, and RICHARD P. BRIMLEY	:	
-vs-	:	Civil No. H-156
BOARD OF EDUCATION OF THE TOWN OF EAST HARTFORD, and BARBARA ATWOOD, ROBERT BANNON, KENNETH CARRIER, M. GLENN FRANK, ELEANOR KEPLER, WALTER H. MILLS, JR., TIMOTHY J. MOYNIHAN, JOYCE RUGGLES and JOHN J. SMITH, JR., Individually, and in their capacities as Members of the BOARD OF EDUCATION OF THE TOWN OF EAST HARTFORD	:	

RULING ON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

This civil rights action was commenced pursuant to 42 U.S.C. §§ 1983 and 1988, joining as party plaintiffs, Richard P. Brimley, the East Hartford Education Association ("EHEA"), and the Connecticut Education Association, Incorporated ("CEA"). The Board of Education of the Town of East Hartford ("Board") hired Brimley as an English and film-making classroom teacher in the public school system. The members of the Board are named as defendants, both individually and in their official capacity as Board members. The complaint asks the Court to declare the dress code policy adopted by the Board on March 6, 1972, to be unconstitutional on its face and as applied to these plaintiffs. They ask the Court to declare the suit to be a class action under Rule 23, Fed. R. Civ. P., thereby including as plaintiffs all teachers

who are employed by the Board of Education in the Town of East Hartford. They request that the Court grant a permanent injunction restraining the local Board from maintaining and enforcing the challenged dress code and grant them their attorney's fees with costs of suit. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1343, 2201 and 2202.

The present posture of the case before the Court is on the defendants' motion for judgment on the pleadings, pursuant to Rule 12(c), Fed. R. Civ. P. The defendants[1/] represent that the complaint fails to state a legal basis upon which relief might be granted. The parties agree that there are no material factual issues to be decided and the case could be decided as a matter of law. After reviewing the pleadings, affidavits, exhibits and all other papers on file, the Court finds that the "dress code" prescribed by the Board meets constitutional standards and is not so vague or overly broad as to be unenforceable. The defendants' policy action is within the lawful authority delegated to local school boardds by the Connecticut Legislature.

Factual Background

Plaintiff Brimley represents that he chooses to conduct his classes, while wearing a sport shirt without a tie or a sport jacket or sweater. He asserts the following reasons as the basis for his position: (1) that he wishes to present

himself to his students as a person not tied to "establishment conformity"; (2) he wants to symbolically indicate to his students, his association with what he believes to be the ideas of the generation to which the students belong, including the rejection of many of the customs and values and social outlook of the older generation; and (3) he believes that dress of this type enables him to achieve a closer rapport with his students and thus enhance his ability to teach.

Historically, teachers and school administrators in East Hartford Schools observed Generally understood, but unwritten rules, prescribing a degree of formality in a teacher's classroom attire, which included the wearing of coats and neckties by men. Plaintiff Brimley, as far back as March 7, 1970, raised the issue by wearing a sport shirt and sweater to school without a coat or necktie. When reprimanded, he filed a grievance under the local teachers' collective bargaining agreement. The grievance was rejected by the school principal, who cited the administration's interpretation of the then existing rule as follows:

> "The wearing of a jacket and tie or jacket and turtleneck shirt meets the intent of this memorandum. A sweater and sports shirt without tie are sport wear and therefore not appropriate attire."

When the case finally reached the arbitration stage, the Board claimed that the issue was not arbitrable under

the teachers' bargaining contract and while the matter was pending the existing contract expired and a new agreement was negotiated. The latter agreement provided for the filing of grievances with ultimate arbitration if not settled. Much of this background information is taken from the January 25, 1973 findings of the distinguished arbiter, Archibald Cox, who declined to pass upon the issue. His decision, while expressing his personal opinion that the type of grievance was more appropriately a subject of arbitration rather than judicial determination, held that final and binding arbitration on the grievance issues presently before the Court were not jurisdictionally subject to arbitration procedures under the teachers' labor agreement.

The challenged dress code adopted by the Board on March 6, 1972, and thereafter promulgated provided:

> "The attire of professional employees during the hours when school is in session must be judged in light of the following:
>
> 1. Dress should reflect the professional position of the employee.
>
> 2. Attire should be that which is commonly accepted in the community.
>
> 3. It should be exemplary of the students with whom the professional employee works.
>
> 4. Clothing should be appropriate to the assignment of the employee, such as slacks, and jerseys for gym teachers.
>
> In most circumstances the application of the above criteria to classroom teachers would call for jacket, shirt and tie for men and dress, skirts, blouse and pantsuits for women.

> If an individual teacher feels that informal clothing such as sportswear, would be appropriate to his or her teaching assignment, or would enable him or her to carry out assigned duties more effectively, such requests may be brought to the attention of the Principal or Superintendent. An attempt should be made on all levels to insure that the above principles are applied equitably and consistently throughout the school system."

Issue

Does the local Board of Education have the constitutional right to establish by rule an enforceable minimal dress code guideline for teachers in the local school system; or is the individual teacher's interest in appearing as he pleases, a protected interest in "personal liberty" within the meaning of the due process clause of the first and fourteenth amendments.

Law

The plaintiffs claim that any teacher has the constitutional right to dress and conduct himself as his own conscience commands, so long as the matter of dress and conduct do not interfere with any legitimate state interest. They assert that the municipality and the state has no more lawful interest in an unoffensive manner of attire, than it does in the bridal chamber. It is their contention that there has been no showing that the exercise of the forbidden right

would materially or substantially interfere with the requirements of appropriate discipline for the proper administration of the school.

The legal claim asserted here involves the plaintiff's personal liberty to dress as he chooses during his working hours as a public school teacher, which right he claims to be protected under the Civil Rights Act, 42 U.S.C. § 1983. Available remedies under the local teachers' collective bargaining contract have been exhausted through arbitration and no other such administrative remedies are presently available to gain effective relief. See Damico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed.2d 647 (1967); McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969).

The United States Supreme Court has not yet ruled upon the issues raised here. However, the Second Circuit has recently considered the case of Dwen v. Barry, 483 F.2d 1126, 1130 (2d Cir. 1973), involving a municipal police department grooming code and found that a substantial constitutional issue had been raised by the regulation affecting the plaintiff's hair length. In that case the Court said,

> "We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation. Here the department has failed to make the slightest showing of the relationship between its regulation and the legitimate interest it sought to promote."

The United States Supreme Court granted certiorari in the aforesaid case and it is presently pending before this term of the Court.

In a similar matter, Justice Black had before him an emergency motion to vacate a stay of injunction in an appellate case related to due process and equal protection, which involved a local standard for students' hair styles, Karr v. Schmidt, 320 F.Supp. 728 (W.D. Texas 1970). The judgment was stayed and Justice Black refused to vacate it. His memorandum, 401 U.S. 1201, 1202, 91 S.Ct. 592, 27 L.Ed. 2d 797 (1971), disclosed his own view of the matter when he said,

> "I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. . . .
>
> "Moreover, our Constitution has sought to distribute the power of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs."

It should be noted, however, that the Supreme Court has recently, in a new reach of federal jurisdiction, extended federal due process rules into the local school's disciplinary system. In Goss v. Lopez, 419 U.S. 565 (1975), it required a preliminary notice and hearing before a suspension of ten days could be lawfully imposed on a student, except under emergency conditions. This was the first time that a federal court decided that it, rather than local educational officials

or the state legislature, had the authority to determine the local rules applicable to routine classroom discipline of children and teenagers in the public schools. The Court justified this intrusion by identifying a new constitutional procedural right; the right of a student not to be suspended from school without a due process hearing either before or promptly following the suspension.

It was after reviewing Justice Black's opinion that the Fifth Circuit in an 8 - 7 opinion felt compelled to reverse Karr v. Schmidt, supra, in 460 F.2d 609 (en banc 1972) and announced a per se rule directing all district courts in the Fifth Circuit thereafter to dismiss forthwith, for failure to state a valid claim, any complaint which "merely alleges the constitutional invalidity of a high school hair and grooming regulation."

A panel of the Seventh Circuit Court recently expressed its unanimous opinion concerning the application of the due process clause as it related to school dress code regulations, when it said in Miller v. School District Number 167, Cook County, Ill., 495 F.2d 658 (7th Cir. 1974):

> "Unquestionably, individual choice in matters of hair style, dress, and overall appearance can reasonably be characterized as an aspect of freedom or 'liberty.' Sometimes the choice reflects a religious conviction, the expression of political faith, a national or family heritage, or simply a personal interest in projecting a special image or character. The word 'liberty' is not demeaned by construing it to include a right to appear as one pleases." (at 663).
>
> . . . .

"Even if we assume for purposes of decision that an individual's interest in selecting his own style of dress or appearance is an interest in liberty, it is nevertheless perfectly clear that every restriction on that interest is not an unconstitutional deprivation. (at 664).

. . . .

"If a school board should correctly conclude that a teacher's style of dress or plumage, has an adverse impact on the educational process, and if that conclusion conflicts with the teacher's interest in selecting his own life style, we have no doubt that the interest of the teacher is subordinate to the public interest. (at 667).

. . . .

"Although the interest of children in associating with persons of their choice is, of course, severely limited by both their parents and the State, we should not ignore the fact that they do have a valid interest in not being compelled to associate with persons they or their parents consider objectionable. In the classroom, since their presence is compelled, they necessarily must look to the school board for protection of this interest. . . . We do not necessarily approve the decision this school board, or any school board, might make . . . we merely hold that as long as no greater interest than that involved in this controversy is at stake, the decision is one that the school board is entitled to make. (at 667-8).

. . . .

"We therefore hold that even if the individual interest in one's appearance may be characterized as an interest in liberty, the denial of public employment because the employer considers the applicant's appearance inappropriate for the position in question, does not in and of itself represent a deprivation that is forbidden by the Due Process Clause." (at 668).

Also see, Holsapple v. Woods, 500 F.2d 49, 52 n.2 (7th Cir. 1974); and Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970).

The plaintiffs approach the issue from its negative aspect, claiming that unless it can be demonstrated that Brimley's style of dress materially interferes with the discipline or proper administration of his classroom, the Board has no right to regulate it. However, it is a generally accepted fact that the school board in each community of Connecticut has the right by law[2/] to make provision for an adequate education for the children of that community; and that they are elected or appointed to do just that.

It almost goes without saying that parents, as well as a majority of the teaching profession, expect teachers to possess and maintain certain qualities: to have knowledge of their subject and the ability to convey it, to be morally above reproach and to be physically clean, neat and well-groomed. Teachers set an example in dress and grooming for their students to follow. A teacher who understands this precept and adheres to it enlarges the importance of the task of teaching, presents an image of dignity and encourages respect for authority, which acts as a positive factor in maintaining classroom discipline. Most teachers recognize this aspect of their responsibilities, and maintain a standard of good grooming without requiring school boards to adopt rules. Without such regulations, however, some school systems have been faced with male teachers' arriving in the classroom wearing "Bermuda shorts" or similarly inappropriate forms of flamboyant dress.

Common sense teaches that whether or not a male classroom teacher wears a tie and coat will not determine the ultimate measure of his success or failure. The rule simply provides a minimal standard to encourage a degree of formality in the teaching relationship. It is doubtful that anyone would expect to prevail against a school board rule which required a teacher to stand up at all times while actually teaching a class; yet this latter requirement is not a unique rule. There are school boards and superintendents who consider it necessary for effective teaching. Whether teachers or the general public accept this precept as one of major pedagogical importance does not detract from the school board's right to make and enforce such a regulation.

Teachers work within the academic setting only six or seven hours of the total day. Outside this work environment, they are free to dress as they wish, so long as they do not offend the criminal code. A dress code does not impose that same degree of restraint on the liberty of an individual, as does such a restriction on the permanent physical facial appearance of an adult, as results from being required to remove a beard or change the fashion of his hair style. Those affects once having been made are continuous in nature and may present a more significant invasion of personal choice and individual liberty.

If plaintiff Brimley does not wish to observe the

Board's rule, he is free to go elsewhere and find a school system where conformance to a dress code is not required. His freedom of choice in this respect is unlimited. The Court finds that the local Board rule does not violate due process of law under the fourteenth amendment, and it is not the type of symbolic act that is contemplated to be within the free speech clause of the first amendment. The Court finds that a legitimate governmental interest exists here and the regulation is not unconstitutional because it is overly vague and unenforceable. See Tinker v. Des Moines School Dist., 393 U.S. 503, 505 (1969).

The defendants' motion for judgment is granted pursuant to Rule 12(c), Fed. R. Civ. P., on the grounds that the plaintiffs' complaint fails to state a claim upon which relief can be granted. SO ORDERED.

Dated at Hartford, Connecticut, this 3rd day of October, 1975.

T. Emmet Clarie
Chief Judge